

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANTHONY MICHAEL TERRY,

Petitioner,

v.

JEFFRY UTTECHT,

Respondent.

CASE NO. C13-1326-MJP

ORDER DISMISSING PETITION
WITHOUT PREJUDICE AND
DENYING ISSUANCE OF A
CERTIFICATE OF
APPEALABILITY

The Court, having reviewed Petitioner's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus, Respondent's Answer, Petitioner's Reply, the Report and Recommendation of the Honorable Mary Alice Theiler, United States Magistrate Judge, Petitioner's objections, and the remaining record, finds and orders as follows:

1. The Report and Recommendation is ADOPTED;
2. Petitioner's § 2254 habeas petition is DISMISSED without prejudice to refiling once all claims have been fully exhausted in state court. "Before a federal court may consider the merits of a state prisoner's petition for a writ of habeas corpus, the prisoner generally must first exhaust his available state court remedies." Smith v.

1 Baldwin, 510 F.3d 1127, 1137-38 (9th Cir. 2007). Petitioner has not exhausted his
2 available state court remedies in regard to his fifth claim in which he alleges a due-
3 process violation based on the effect of cumulative trial errors. (Dkt. No. 19 at 1.)
4 Petitioner states, “Cumulative error is not in itself a ground for relief, but merely a
5 process used by the federal courts to evaluate the prejudice from several underlying
6 constitutional violations.” (Dkt. No. 20 at 2.) A claim of cumulative error “comes
7 into play when no single trial error is, on its own, sufficiently prejudicial to warrant
8 reversal[;]” it is a separate claim from the others he raises in his petition. See Wooten
9 v. Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008). Petitioner has not exhausted his
10 state remedies because he failed to bring a claim of cumulative error on appeal and
11 failed to file a personal restraint petition. (Dkt. No. 19 at 2.) Until Petitioner has
12 exhausted his available state remedies, this Court cannot hear his petition for habeas
13 corpus. 28 U.S.C. § 2254(b).

14 3. Petitioner is DENIED issuance of a certificate of appealability; and

15 4. The Clerk shall send a copy of this Order to the parties and to Judge Theiler.

16 Dated February 12, 2014.

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19 Marsha J. Pechman
20 United States District Judge
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